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**IN THE  
COURT OF APPEALS OF INDIANA**

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MAURICE COLE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0612-CR-1097

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Priscilla Fossum, Judge Pro Tempore  
Cause No. 49G01-0607-FC-124260

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**October 25, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

In appealing a habitual offender enhancement, Maurice Cole asserts that the information was not amended to include the habitual offender allegation. We affirm.

## **Facts and Procedural History**

The facts most favorable to the verdict are that on July 7, 2006, Cole attempted to exit a Kroger store without paying for a bag of meat. Unbeknownst to Cole, an employee had been watching him. That employee, with the help of two other Kroger workers, tried to stop him, and a struggle ensued. During the tussle, Cole pulled a pocket knife from his pocket, started swinging, and cut one of the employees across the stomach. Cole escaped.

On July 10, 2006, the State charged Cole with class C felony battery and class D felony theft. App. at 34-35. On September 5, 2006, a “Notice of Filing Habitual Offender” was filed in which the State “notifie[d] the Court and [Cole] that the State . . . is seeking to have [Cole] sentenced as an Habitual Offender by filing a separate page alleging two prior unrelated felony convictions under the provisions of Indiana Code 35-50-2-8.” *Id.* at 43. Along with that notice, the State filed a motion for leave to fingerprint Cole prior to the habitual offender sentencing hearing and filed a habitual offender information that listed Cole’s two prior unrelated felony convictions. *Id.* at 42, 44-45. The next day, the court granted the motion to fingerprint Cole “prior to the habitual offender Sentencing hearing in Marion Superior Court, Criminal Division[.]” *Id.* at 46. On September 13, 2006, the court held an initial hearing and advised Cole “of rights as habitual offender.” *Id.* at 6-7.

On October 25, 2006, a jury trial was held at the conclusion of which the jurors found Cole guilty of both battery and theft. *Id.* at 8-9, 87-88; Tr. at 140. Cole pled guilty to the

habitual offender enhancement. Tr. at 142-48.

On November 3, 2006, the court sentenced Cole to six years for the battery conviction, eighteen months for the theft conviction, ordered the terms to be served concurrently, and enhanced the battery charge by four years due to the habitual offender status. App. at 29. Accordingly, Cole received a ten-year total sentence.

### **Discussion and Decision**

Cole argues that his habitual offender enhancement should be vacated because the State “never moved to amend the information with the habitual offender allegation. It merely filed a notice.” Appellant’s Br. at 6. As such, his argument continues, the court “never granted a motion to amend that was never made; and the information was thus never amended to include the enhancement.” *Id.*

“A written allegation of habitual offender status is not a pleading which charges a separate criminal offense.” *Nash v. State*, 545 N.E.2d 566, 567 (Ind. 1989). It must be made as a separable part of an indictment or information charging a criminal offense. *See id.*; Ind. Code § 35-50-2-8(a). The rules governing habitual offender pleading and prosecution are the same as those governing the pleading and prosecution of outright criminal charges. *See Griffin v. State*, 439 N.E.2d 160, 163-64 (Ind. 1982). “Therefore, if an allegation is not included as part of the State’s initial pleading, it can be added by following the procedures for amending indictments and informations.” *Nash*, 545 N.E.2d at 567.

Ordinarily, amendments to charges or informations are governed by Indiana Code

Section 35-34-1-5,<sup>1</sup> which provides as follows:

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

- (1) thirty (30) days if the defendant is charged with a felony; or
- (2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date. When the information or indictment is amended, it shall be signed by the prosecuting attorney.

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

(d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

*(e) An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.*

(Emphasis added); *see also Fajardo v. State*, 859 N.E.2d 1201, 1203-05 (Ind. 2007).

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<sup>1</sup> Recently, the General Assembly amended Section 35-34-1-5 so that a charging information may be amended at any time prior to trial as to either form or substance, as long as such amendment does not prejudice the substantial rights of the defendant. *See* P.L. 178-2007 § 1 (emergency eff. May 8, 2007). However, the new version is inapplicable to Cole's case given that his crimes, trial, and sentencing occurred before the new statute became effective.

Cole's situation presents an anomaly. Fortunately, our case law provides guidance for similar procedural irregularities. "When a defendant is given reasonable notice of the habitual offender charge and an opportunity to be heard on that claim, there is no prejudicial error shown from technical or procedural errors." *Rowold v. State*, 629 N.E.2d 1285, 1288 (Ind. Ct. App. 1994); *Adams v. State*, 539 N.E.2d 471, 472 (Ind. 1989); *Gillie v. State*, 465 N.E.2d 1380 (Ind. 1984).

Regardless of the type of irregularity, the case law consistently focuses on notice, opportunity to prepare a defense, and prejudice. In *Adams*, for example, our supreme court stated as follows:

Appellant claims the filing of the habitual offender charge was not procedurally correct in that it was filed without permission of the court and without any basis being submitted to the court that would justify the filing of such an amendment. However, this Court in *Murphy v. State* (1986), Ind., 499 N.E.2d 1077 held that the State implicitly moved to add the habitual offender count when it filed the amended information which then became effective when accepted by the court. *We see nothing in this record to indicate that appellant was not aware of the situation and was not given the opportunity to answer the allegations.*

539 N.E.2d at 472 (emphasis added).

In *Salahuddin v. State*, 492 N.E.2d 292 (Ind. 1986), the appellant claimed that he was deprived of notice and opportunity to be heard regarding his being found an habitual offender because the State's motion to amend his information to allege such was never ruled on by the court. Our supreme court responded:

The State did move to amend the information to include an accusation of habitual offender status on May 4, 1984. *While the record does not reveal any ruling by the trial court on the motion, on July 13, 1984, the trial court did grant the State's Motion for Leave to Fingerprint the Defendant Prior to Habitual Offender Sentencing Hearing.* Trial by jury commenced on February 25, 1985. Appellant was aware at least seven months prior to trial that the issue of habitual offender status would be raised. He never objected to the court's failure to rule on the motion to amend the information. By not objecting, Appellant waived the issue, even though he maintains the error is of constitutional dimension. *Mitchell v. State* (1983), Ind., 455 N.E.2d 1131, 1132. Furthermore, *Appellant should not be heard to argue he was denied notice and opportunity to be heard regarding the issue since his counsel specifically acknowledged that they were prepared to proceed with the habitual offender phase.*

*Id.* at 296 (emphases added).

In *Nash*, the appellant complained that the State did not make the motion to amend its information for theft when adding its allegation of habitual offender as required by Indiana Code Section 35-34-1-5(a) and -(c) for amending indictments and informations. 545 N.E.2d at 567. Concluding there was “no error warranting remedy,” our supreme court explained:

*The purpose of requiring a motion to amend with notice to all parties is to provide trial court oversight of the process and to give the parties an opportunity to be heard on the merits of the proposed amendment and to consider possible continuances and other adjustments. Assuming without deciding that a motion to amend was required in these circumstances because the amendment was not sought more than thirty days before the omnibus date, it is clear from the court's entry of January 29 that the judge, the prosecutor, the defendant and defense counsel were all present when the written allegation of habitual offender, denominated Count II, was filed and a trial date considered. The purposes of the motion to amend were therefore fulfilled, and the lack of that formal motion to amend did no prejudice to substantial rights.*

*Id.* (emphases added).

Here, the State filed its Notice of Filing Habitual Offender more than six weeks prior to Cole's trial. Thus, it is difficult to imagine Cole had insufficient time to prepare a defense

to the habitual offender allegation. *Cf. Cheney v. State*, 486 N.E.2d 508, 514 (Ind. 1985) (concluding that amending information to include habitual offender count approximately one and one-half months before trial commenced did not prejudice defendant's substantial rights, but instead permitted appellant to adequately prepare his defense). Moreover, the State's Notice did not hide the ball. Rather, it clearly "notifie[d] the Court and [Cole] that the State . . . [was] seeking to have [Cole] sentenced as an Habitual Offender by filing a separate page alleging two prior unrelated felony convictions under the provisions of Indiana Code 35-50-2-8." App. at 43; *see Erickson v. State*, 438 N.E.2d 269, 271 (Ind. 1982) (addressing assertion that arraigning appellant on habitual offender charge and requiring him to enter a plea on that count confused him as to the nature of the charge against him; "This is the kind of technical or trivial error which we hold does not require reversal.").

Along with the Notice of Filing Habitual Offender, the State filed a Motion for Leave to Fingerprint Cole Prior to Habitual Offender Sentencing Hearing. *Id.* at 42. In addition, the State filed an information labeled "Habitual Offender" that included the citation to Indiana Code Section 35-50-2-8 and specifically listed Cole's two prior unrelated felony convictions: (1) March 27, 2002, Marion Superior Court, robbery as a class C felony; and (2) June 1, 2005, Marion Superior Court, theft as a class D felony. *Id.* at 44-45. The very next day, the court granted the motion to fingerprint Cole "prior to the habitual offender Sentencing hearing in Marion Superior Court, Criminal Division[.]" *Id.* at 46. On September 13, 2006, the court held an initial hearing and advised Cole "of rights as habitual offender." *Id.* at 6-7.

After the jury found him guilty, the court and Cole engaged in the following lengthy

colloquy:

Court: The State did file an habitual charge in this case. And based on the conviction it's now the opportunity to go forward on the habitual charge. Mr. Lamar, did you have something you wanted – did you want to address that issue?

Mr. Lamar [defense counsel]: Yes, Judge. I spoke with Mr. Cole about this while the jury was deliberating. He has decided that at this point in time it would be best to indeed admit that he is one in the same Maurice Cole who has the two prior convictions out of Marion County.

Court: Okay. And so my suggestion is that we bring the jury back in, formerly [sic] excuse them and then take a very short break. I can go ahead and accept the guilty plea to the habitual at this point in time, or we can do that at the date of sentencing.

Ms. McCoy [State]: I would prefer to do it today.

Court: Okay. All right. So let's bring the jury back in and we can formally excuse them on the record.

Mr. Lamar: If we're going to do it tonight perhaps it would be best if we just went through it right now because if there is a glitch, then we still have the jury.

Court: Okay. That's fine. That's fine.

Mr. Lamar: I don't expect anything like that, but . . .

Court: Sure. Sure. . . .

Court: Everybody have a seat. Now I want to make sure I understand. This is pleading guilty, not just stipulating to the admission of the habitual, right, he's going to plead guilty?

Mr. Lamar: Yes.

Court: Okay. I just want to make sure I didn't misunderstand.

Mr. Lamar: I think the State will probably still do their exhibits and all that.

Court: Okay.

Mr. Lamar: So whatever you want to call it.

Court: All right. I just need to make sure I use the correct language when I do this. Mr. Cole, I need to ask you some questions before I can accept your plea of guilty or your admission to being an habitual offender, so I'm going to swear you in as a witness. [Swears him in.]

Court: Okay. Sir, your attorney has indicated that you wish to plead guilty to being – to the habitual offender charge, is that correct?

Cole: Yes.

Court: How old are you, sir?

Cole: Thirty.

Court: Thirty. And how far did you go in school?

Cole: Eleventh.



Court: Eleventh grade. Okay. And you read, write and understand the English language, correct?

Cole: Yes.

Court: So we're not going to have a written guilty plea, am I correct here?

Ms. McCoy: Correct.

Court: Okay. Did you receive a copy of the charging information on the habitual charge?

Cole: Yes.

Court: And have you reviewed it with your counsel?

Cole: Yes.

Court: And did he discuss with you the potential penalty you face under that charge, it's an enhancement of the felony sentence, did he discuss that with you?

Cole: Yes.

Court: And you understand that?

Cole: Yes.

Court: Okay. Now, there is not an agreement here, there is not an agreement to the time that he will serve, am I correct there?

Ms. McCoy: No, there's no agreement.

Court: Okay. All right. Now, you understand there are several jury trial rights that you will be waiving by pleading guilty to the Court on the habitual charge, and in fact we just underwent a jury trial, didn't we?

Cole: Yes.

Court: So you understand that you have a right to a speedy and public trial by jury on the habitual charge, is that correct?

Cole: Yes.

Court: Okay. And that you have the right to hear and cross-examine the witnesses against you on that charge?

Cole: Yes.

Court: Do you understand that you have the right to have the State prove their case against you beyond a reasonable doubt?

Cole: Yes.

Court: And do you understand that you would have the right to subpoena your own witnesses and to testify on your own behalf or to remain silent regarding this habitual charge?

Cole: Yeah.

Court: All right. Do you understand that by pleading guilty you're waiving the rights only related to the habitual offender charge?

Cole: Yes.

Court: Okay. And do you understand that the Court will sentence you and enter judgment, make a finding that you are a habitual offender without a jury making the decision?

Cole: Yes.

Court: Okay. And that you will be admitting the material allegations in the habitual offender charge, do you understand that?

Cole: Yes.

Court: Okay. And that if you had the jury – had the jury determine whether or not you were an habitual offender, that you would then have the right to appeal that determination, do you understand that?

Cole: Yes.

Court: Do you need a minute, Mr. Lamar, to explain what I'm talking about there?

Mr. Lamar: Yes, Your Honor. Judge, I think the confusion was on whether he's giving up all his appeal rights.

Court: Certainly, that's understandable. Mr. Lamar is absolutely correct, this does not effect [sic] anything in the prior proceedings. You are not waiving any appellate rights with regard to the jury trial. It's only as to the habitual offender charge. Okay. Do you understand that?

Cole: Yes.

Court: All right. And do you understand that for that appellate process if you couldn't afford an attorney the Court would appoint an attorney to represent you?

Cole: Yes.

Court: Okay. And so you understand that you're waiving the right to take a direct appeal with regard to the habitual offender charge, and just that charge?

Cole: Yes.

Court: Okay. Did anybody promise you anything to get you to plead guilty to the habitual offender charge?

Cole: No.

Court: Were any threats made against you to get you to plead guilty to that?

Cole: No.

Court: And do you believe you're pleading guilty to being an habitual offender voluntarily and of your own free will?

Cole: Yes.

Court: Okay. Now I'm going to ask the State to present its evidence on that. Are you going to read it or are you going to present documents?

[State]: Actually both, Your Honor.

Court: Okay. All right. Sir, Mr. Cole, I'm going to ask you to pay attention because when he's done I'm going to ask you if that's true, all right?

Cole: Yes.

[After State finished reading aloud the documents detailing two prior felonies, the court asked if defense counsel had a chance to review the exhibits.]

Mr. Lamar: Yes, Judge. I have copies.

Court: Do you have an objection to their admission in this proceeding?

Mr. Lamar: No.

Court: Okay. I will show State's Exhibits . . . admitted without objection. And Mr. Cole, I'm going to ask you again. Did you hear what the prosecutor said . . .

Cole: Yes.

Court: And is that true, that you are that same Maurice Cole that had these two previous convictions?

Cole: Yes.

Court: Okay. Okay. I now find that Mr. Cole understands the nature of the habitual offender charge to which he wishes to plead guilty and I will accept his plea of guilty and I will find that Mr. Cole does indeed have two prior unrelated felonies and under the statutes and laws of the State of Indiana he is a habitual offender. Okay . . . .

Tr. at 140-48. At the conclusion of that discussion, the court noted the finding that Cole is “an habitual offender as charged in the habitual offender information.” *Id.* at 148-49.

Given the above, Cole wisely does not contend that he was “surprised” by the habitual offender allegation or that he lacked notice of the habitual offender information. There is no dispute that Cole knew he was charged with being a habitual offender. Moreover, Cole makes no allegation that he was unprepared to defend against the habitual offender charge or that he was denied an opportunity to be heard on the allegation. Cole never denied that he actually committed the prior felonies. Thus, Cole and his counsel decided that he would plead guilty to being a habitual offender. Cole makes no assertion that his plea was anything but informed and voluntary, and the lengthy excerpt *supra* demonstrates that the plea was proper.

In sum, during the entire proceedings below, there was never any doubt that the State was charging Cole with being a habitual offender, that Cole knew that he was being charged with being a habitual offender, that he was given the chance to defend on that charge, or that

he willingly pled guilty to being a habitual offender because the evidence was incontrovertible. Under these particular circumstances, “there is no prejudicial error shown from [the] technical or procedural error” first raised here on appeal. *Rowold*, 629 N.E.2d at 1288. To conclude otherwise would be to elevate form over substance and to ignore our supreme court’s rationale in *Nash*, *Adams*, and *Salahuddin*.

Affirmed.

DARDEN, J., and MAY, J., concur.